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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1970

**No. 434**

UNITED TRANSPORTATION UNION, as successor to the BROTHERHOOD OF RAILROAD TRAINMEN,

*Petitioner,*

v.

THE STATE BAR OF MICHIGAN,

*Respondent.*

**ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN**

## BRIEF FOR PETITIONER

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## Cases

*Brotherhood of Railroad Trainmen, In re,* 13 Ill. 2d 391, 150 N.E. 2d 163 (1958) .....4, 11, 13, 20, 31

*Brotherhood of Railroad Trainmen* v. *Commonwealth of Virginia, ex rel. Virginia State Bar,* 377 U.S. 1, 5, 6, 12 L. Ed. 2d 89, 88 S. Ct. 1113, 11 ALR 3d 1196 (1964) .....2, 7, 10, 12, 13, 15, 16, 17, 21, 23, 30, 34

*Brotherhood of Railroad Trainmen* v. *Commonwealth of Virginia, ex rel. Virginia State Bar,* 207 Va. 182, 149 S.E. 2d 265, 266, 269, 271, 272 (1966) ..19, 20, 25, 34

*Communication Workers* v. *NLRB,* 362 U.S. 479 (1960) .....14, 36

*Hightower* v. *Detroit Edison Co.,* 282 Mich. 1, 247 N.W. 97, 99 (1933) ..... 32

*Mock* v. *Higgins,* 3 Ill. App. 2d 281, 121 N.E. 2d 865, 872 (1954) .....12, 26

*N.A.A.C.P.* v. *Button,* 371 U.S. 415, 433, 83 S. Ct. 328, 340, 9 L. Ed. 405 (1963) .....10, 13, 17, 22, 34, 35

*NLRB* v. *Express Publishing Company,* 312 U.S. 426, (1941) .....14, 36, 37, 38

*Ruffalo, In re,* 390 U.S. 544, 88 S. Ct. 1222, 20 L. Ed. 117 (1968) .....14, 39

*State of Wyoming* v. *State of Colo.,* 286 U.S. 494 (1932) .....14, 36

*United Mine Workers* v. *Illinois Bar Association,* 389 U.S. 217, 19 L. Ed. 2d 426, 88 S. Ct. 353 (1967) .....2, 11, 12, 22, 28, 30

*Willner* v. *Committee on Character and Fitness,* 373 U.S. 96, 135, 83 S. Ct. 1175, 10 L. Ed. 2d 224, 2 ALR 3d 1254 (1963) .....14, 39, 40

## Constitution, Statutes and Code of Professional Responsibility

Constitution of the United States:

Amendment I ..... 3
Amendment XIV ..... 4

28 U.S.C. § 1257 (3) ..... 2
§ 28.642 Michigan Statute Annotated .....3, 13

Code of Professional Responsibility:

Canon 2 .....11, 25
Disc. Rule 2-103 (D) (5) ..... 26
Ethical Consideration 2 ..... 26

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## BRIEF FOR PETITIONER

### OPINIONS BELOW

The first opinion of the Circuit Court for the County of Jackson filed on September 12, 1962 (A. 109) is unreported. The first opinion of the Supreme Court of Michigan (A. 170) is reported at 374 Mich. 152, 132 N.W. 2d 78. The second opinion of the Jackson Circuit Court entered after remand (A. 173) is unreported. The second opinion of the Michigan Supreme Court and the dissent thereto (A. 205) is reported at 383 Mich. 201, 174 N.W. 2d 811 (1970).

## JURISDICTION

The judgment of the Supreme Court of Michigan (A. 220) was entered March 9, 1970. The union's duly filed Petition for Rehearing was denied on May 4, 1970 (A. 222). This Court has jurisdiction of this cause under 28 U.S.C. § 1257 (3).

## QUESTIONS PRESENTED

1. Does a State Court injunction conflict with rights guaranteed to railroad trainmen union members under the First and Fourteenth Amendments to the Constitution of the United States, when it enjoins such members from acts arguably involved in the union's basic plan affording its members the opportunity to accept or reject union counsel to represent them in personal injury or death claims under the Federal Employers' Liability Act?

2. Is the granting of such an injunction prohibited by the decisions of this Court in *Brotherhood of Railroad Trainmen* v. *Commonwealth of Virginia, ex rel. Virginia State Bar*, 377 U.S. 1, 12 L. Ed. 2d 89, 88 S. Ct. 1113, 11 ALR 3d 1196 (1964) and *United Mine Workers* v. *Illinois Bar Association*, 389 U.S. 217, 19 L. Ed. 2d 426, 88 S. Ct. 353 (1967)?

3. Does the granting of that injunction necessarily based upon a Complaint filed in 1959 and on evidence heard in 1961 enjoining acts never pleaded nor proved primarily because the Virginia Courts had entered a similar injunction, deprive Petitioner of procedural due process?

## STATUTE AND CONSTITUTIONAL PROVISIONS INVOLVED

The Statute involved is §28.642 of the Michigan Statutes. That part relied on (A. 10) by the State Bar provides:

> "Any person, firm, co-partnership, association or organization of any kind, either incorporated or unincorporated, or any of the officers, agents, servants, employees, or members of any such person, firm, co-partnership association or organization of any kind, either incorporated or unincorported, or of any division, bureau of committee of such association or organization, either incorporated or unincorporated, who shall directly or indirectly, individually, or by agent, servant, employee or member, solicit any person injured as the result of an accident, his administrator, executor, heirs or assigns, his guardian, or members of the family of the injured person, for the purpose of representing such person in making claim for damages or prosecuting any action or causes of action arising out of any personal injury claim against any other person, firm or corporation, or to employ counsel for the purpose of such solicitation, shall be guilty of a misdemeanor * * *"

The Constitutional provisions involved are the First and Fourteenth Amendments to the Constitution of the United States which provide as follows:

### AMENDMENT 1

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peacefully to assemble, and to petition the Government for a redress of grievances.

## AMENDMENT 14

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATEMENT

### a. The Relevant Pleadings and how the Constitutional Questions were Raised.

This action was commenced on January 28, 1959 (A. 5). The essential thrust of the Complaint is stated in paragraph 5 (A. 7, 8) charging the defendants with engaging in a "well-organized and systematized solicitation" of FELA Claims. Defendant union denied the characterization and alleged that it was in full compliance with the decision of the Supreme Court of Illinois from which the State Bar had obtained the factual material which it alleged. As a result of that decision, *In re Brotherhood of Railroad Trainmen*, 13 Ill. 2d 391, 150 N.E. 2d, 163 (1958), the president of defendant union sent a letter ordering all union counsel to comply therewith on or before April 1, 1959. A copy of the order of the president was set out in the First Affirmative Defense of the Brotherhood (A. 167).

The Complaint based its right to an injunction on a Michigan Statute declaring "solicitation" to be a misdemeanor. Defendant union denied its application and

contended that any application of that statute to apply to its plan of referring members to union counsel would be contrary to rights granted the *Brotherhood* under the Federal Constitution (A. 18).

Plaintiff sought an injunction permanently enjoining the Brotherhood of Railroad Trainmen in only one respect, specifically from engaging in the solicitation of Federal Employers' Liability Claims in the State of Michigan (A. 11). Plaintiff similarly claimed that it was entitled to an injunction against "solicitation" in its statement of claim (A. 29, 30).

Defendant Brotherhood in its Concise Statement of Defense stated, among other things, that the State Bar was attempting to enjoin the Brotherhood on the basis of selected statements from the Illinois Supreme Court Opinion alleged as facts though the allegations were based solely on information and belief; that there was no violation of the Michigan statute; and that the Brotherhood's Plan was protected by rights granted by the Constitution of the United States of America, by federal statutes, and by considerations of public policy (A. 31-33).

**b. The Trial and the Exhibits.**

On June 27th, 1961 the trial opened with counsel for the parties present (A. 34). The first 34 pages of the 86 page transcript of this trial are occupied with an Opening Statement for the State Bar consisting largely of exchanges between counsel and statements as to the allegations which were admitted. (A. 34-62).

Near the close of the Opening Statement, counsel for the State Bar said:

> "* * * We haven't offered *any proof as to disputed matters.* We do not intend to. * * *" (Italics added (A. 61)).

The State Bar offered as its only witness David J. Walsh (A. 62) who testified that he was Supervisor of the Clearing House for the Claims Research Bureau, General Claims Division, of the Association of American Railroads, which is comprised of railroads operating in the United States. The records of the Association of American Railroads had been kept under his supervision since July 1, 1953. and it was the regular course of his business to keep the records (A. 63). He had with him the records of FELA claims of Michigan residents (A. 64).

On Michigan FELA cases reported from July 1, 1953 to March 31, 1955, the Brotherhood's counsel objected on the ground that they were incompetent, irrelevant and immaterial. To this objection counsel for the State Bar replied that:

> "The *only issue* in this case as we see it * * * is whether or not a large volume of these cases arising in Michigan reached the office of Regional Counsel Henslee and associates in Chicago over a period of several years during the operation of this legal aid department. That is placed in issue in our bill and denied by the answer, and this is evidence offered in support of the bill." (A. 64). Emphasis supplied.

The cards testified to came from unidentified sources but were admitted in evidence. Other cards were admitted based on reports made to the organization of the witness, the Claims Research Bureau, during periods from July 1, 1953 through December 31, 1960. On cross examination, the witness testified that he had no personal knowledge of the material contained in the cards.

After its motion to dismiss was denied at the close of the plaintiff's case, the defendant rested.

**c. The 1962 Decision and Decree.**

The trial court's decision (A. 109-112) held that the "* * * recommendation of counsel by the Brotherhood is the nub of the proceedings * * * the right of freedom of speech being basically involved" (A. 111). The injunctive provisions of the Decree enjoined the Brotherhood in six respects relating to the procurement, within the State of Michigan, of a lawyer to render "any" legal services (A. 117-118). These injunctive provisions essentially prohibited the making of unsolicited calls upon a "person" or his representative for the purpose of arranging for the employment of a lawyer or for the purpose of furnishing a lawyer to such person or representative.

**d. The Mandate of the Michigan Supreme Court.**

The 1962 Decree was appealed but before argument this Court handed down it Opinion in *Brotherhood of R. Trainmen* v. *Commonwealth of Virginia, ex rel. Virginia State Bar*, 377 U.S. 1, 12 L. Ed. 2d 89, 88 S. Ct. 1113 (1964). The Michigan Supreme Court, after argument, remanded to the Circuit Court stating (A. 449) at 374 Mich. 152, 132 N.W. 2d 78, 79 (1965):

> "Now that the Supreme Court has decided the Virginia Case, we find no alternative other than that of reversal and remand, as in the Virginia Case, for proceedings in the Jackson Circuit not inconsistent with the Supreme Court's said opinion. It is so ordered, with no award of costs as to either court.
>
> "Since a public question of moment is involved, we remand with permission for amendment of plaintiff's bill to seek, if it be so advised, relief not inconsistent with the Supreme Court's said opinion."

**e. Proceedings on Remand.**

After remand, a motion was made for further proceedings by the State Bar (R. 450). This motion was heard on February 5, 1965 with counsel for the State Bar stating: "The plaintiff does not care to amend the Complaint. . . ." Defendant insisted upon the amendment of that Complaint and the matter was taken under advisement (R. 472-483), with briefs being filed on both sides. No ruling was ever made on that motion.

In April of 1968, a motion for judgment was made (R. 454-456). The hearing was had on May 3, 1968. The State Bar urged the adoption of a Decree entered in the State of Virginia after remand by the United States Supreme Court (R. 483). In response, the Brotherhood stated that the mandate of the Supreme Court of Michigan required the filing of a new Complaint; that the Decree was contrary to the *Brotherhood of Railroad Trainmen decision*, and that the *United Mine Workers* case handed down by the United States Supreme Court in December of 1967 was also directly relevant (R. 484). The trial court denied these contentions of the *Brotherhood*. It entered its Opinion and Order, and Decree on May 24, 1968 (R. 458-461).

In that Opinion, the court dismissed all of the individually named defendants and entered its Decree against the *Brotherhood of Railroad Trainmen* and all of its members, agents and officers in the State of Michigan (R. 459). The court stated that the Supreme Court of Virginia had modified the Decree entered on remand by the Virginia trial court in *Brotherhood of R. Trainmen* v. *Commonwealth of Virginia, ex rel. Virginia State Bar*, 207 Va. 182, 149 S.E. 2d 265 (1966). The court distinguished the *Mine Workers* case as being limited to the

hiring of attorneys on a salary basis and stated that its Decree was in conformity with the interpretation of the Supreme Court mandate as made by the Virginia Supreme Court (R. 459).

On appeal the Michigan Supreme Court affirmed the 1968 injunction. In its Opinion, (R. 497-511) the Michigan Supreme Court, while indulging in language which is most turgid, appears to hold that it was compelled to affirm the decree because it is similar to a decree affirmed as modified by the Virginia Supreme Court of Appeals at 207 Va. 182, 149 S.E. 2d 265.

The Brotherhood of Railroad Trainmen and other national railway operating unions were negotiating with a view towards merging while plaintiff was moving for judgment in this case. Since the Decree was entered, a referendum vote was held among the membership of the organizations and on January 1, 1969, the Brotherhood of Railroad Trainmen merged into a newly created union, the United Transportation Union, along with the Brotherhood of Locomotive Firemen and Enginemen, the Order of Railway Conductors and Brakemen and the Switchmen's Union of North America. Petitioner is the successor union.

## SUMMARY OF ARGUMENT

### I.

The judgment below interferes with the Petitioner's plan of providing counsel for its members. It thereby seriously restricts the Petitioner's rights of freedom of speech and freedom of assembly, even though those constitutional rights in the operation of its legal services plan were confirmed by this Court in *Brotherhood of Railroad Trainmen* v. *Commonwealth of Virginia, ex rel. Virginia State Bar*, 377 U.S. 1, 12 L. Ed. 2d 89, 88 S. Ct. 1113, 11 ALR 3d 1196 (1964).

The court below wrongly placed the burden on the union to prove a "specific order forwarded from Washington." The proper test as established by this Court's decisions required the State to prove "substantive evils" flowing from the operation of the plan before it could claim a substantial regulatory interest.

The Decree is defective because it lacks the precision constitutionally required. *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 83 S. Ct. 328, 9 L. Ed. 2d 405 (1963). The reliance of the court below on the Virginia Supreme Court of Appeals was unjustified. That court decided the case upon the narrowest rational consideration of this Court's Opinion and mandate. Furthermore, it failed to consider the pleadings, the evidence, or the Decree, relying instead upon a hypertechnical "rightness" of the portion of the Decree remaining after reversal by this Court. This "rightness" was held to result from the denial of the first petition for leave to appeal in that case. Many other untenable distinctions were drawn by the Virginia courts. The Michigan Courts surpassed Virginia in the drawing of unwarranted distinctions.

The superseded 1962 Michigan injunction was based on *In re Brotherhood of Railroad Trainmen*, 13 Ill. 2d 391, 150 N.E. 2d 163 (1958). Sections of that Opinion favoring the union, however, were rejected. The 1962 injunction was reversed by the Michigan Supreme Court because of this Court's 1964 Brotherhood Opinion with permission granted the State Bar to amend the Complaint. On remand, the State Bar refused to amend. In 1965, a motion was made for further proceedings. This motion was never ruled on. In 1968, the State Bar tendered the injunctive provisions of the modified Virginia decree. The union again insisted that an amended complaint was required. That contention was rejected and the decree was entered and affirmed by the court below. That court stated that it was not willing to grant the Brotherhood more relief in Michigan than it had obtained in Virginia and erroneously held that this Court's decision in *United Mine Workers* v. *Illinois Bar Association*, 389 U.S. 217, 19 L. Ed. 2d 426, 88 S. Ct. 353 (1967) was not applicable.

A detailed examination of each of the injunctive provisions confirms their unconstitutionality. The first provision would stifle all statements by union members when read as written. Read otherwise, it is without foundation. The second provision is unintelligible. The Virginia Supreme Court interpretation is specifically designed to strike at the lawyers cooperating with the Brotherhood plan. On the other hand, the State Bar's reading, that "mass solicitation of claims" after rejection of legal counsel is prohibited, is pure gossamer. Moreover, the provision conflicts with Canon 2, of the Code of Professional Responsibility. That Code permits legal services plans only to the extent constitutionally permissible. It is, therefore, important that this Court not permit constitu-

tional rights to be hamstrung by the drawing of hypertechnical distinctions.

The third provision prohibits statements about advances. It is not limited to inducements to a retainer. It is also completely unfounded. Illinois counsel are permitted to make such advances after retainer, *Mock* v. *Higgins*, 3 Ill. App. 2d 281, 121 N.E. 2d 865, 872 (1954). Such advances, if made, are not part of the union's plan.

The fourth provision prohibits the controlling of fees. This control is no longer exercised.

The 3 remaining provisions relate to a supposed profit by the union. Each is unfounded. Moreover, the union in the past never made a profit from such practices; payments being purely for reimbursement.

This Court's mandate in 1964 Brotherhood requires the reversal of the judgment below. When *United Mine Workers* v. *Illinois Bar Association*, 389 U.S. 217, 19 L. Ed. 2d 426 88 S. Ct. 353 (1967) is analyzed, it is seen that it more specifically compels reversal. The financial connection permitted there is similar to those prohibited here. This Court's decisions in *Brotherhood of Railroad Trainmen* v. *Commonwealth of Virginia ex rel. Virginia State* Bar, 377 U.S. 1, 12 L. Ed. 2d 89, 88 S. Ct. 1113, 11 ALR 3d 1196 (1964) and *United Mine Workers* v. *Illinois Bar Association*, 389 U.S. 217, 19 L. Ed. 2d 426, 88 S. Ct. 353 (1967), when considered in the light of the irrelevant statements of the court below, and in the light of the lack of evidence at the only hearing in the case, clearly compels reversal.

## II.

The opinion and judgment below was based upon acts not pleaded or proved and as to which Petitioner never had a hearing. Such conduct deprived the Petitioner of its constitutional right of procedural due process.

The cause, when begun, was based upon a paraphrase of some factual statements made by the Illinois Supreme Court in re Brotherhood of Railroad Trainmen, 13 Ill. 2d 391, 150 N.E. 2d 163 (1958). It was also based upon 28.642, Michigan Statute Annotated, prohibiting solicitation. The theory of the State Bar was solely based upon the allegation that the Brotherhood's plan of contacting injured members constituted illegal solicitation. This was the only contention made in its opening statement at the hearing or throughout that hearing.

Findings as to solicitation and as to the applicability of the Michigan Statute were the only findings made as part of the 1962 Decree. The injunctive provisions of that Decree are not related to the findings of fact. The 1962 Decree, when compared with the 1968 Decree, is the more specific. The 1962 Decree does not support the entry of the 1968 Decree and the contention to the contrary is erroneous.

The 1968 Decree omits the findings contained in the Virginia Decree and contains no findings. The Michigan Statute cannot be the basis of any decree because of this Court's decision in *Brotherhood of Railroad Trainmen* v. *Commonwealth of Virginia, ex rel. Virginia State Bar*, 377 U.S. 1, 12 L. Ed. 2d 89, 88 S. Ct. 1113, 11 ALR 3d 1196 (1964) and *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 83 S. Ct. 328, 9 L. Ed. 2d 405 (1963). A statute which prohibits a simple referral to a lawyer as "solicitation" is

constitutionally impermissible. The latest proofs deal with events in 1960. Those proofs are cards supplied by railroads. The only witness testified that the Association of American Railroads had investigators in Michigan since 1953.

The defense of compliance with the Illinois decision was erroneously rejected by the Chancellor in 1962. The Illinois decision has been superseded by this Court's constitutional decisions. If it is assumed, contrary to the fact, that there was some proof of unlawful acts, it is nevertheless clear that other disassociated unlawful acts should be stricken from the Decree. *State of Wyoming* v. *State of Colorado,* 286 U.S. 494 (1932); *NLRB* v. *Express Publishing Company,* 312 U.S. 426 (1941); and *Communication Workers* v. *NLRB,* 362 U.S. 479 (1960).

Mere lack of proof does not raise questions of constitutional due process but complete, or almost complete, lack of proof does raise such an issue as does the taking of statements from other court decisions for use in the issuance of a present injunction. The changing of the burden of proof in the course of a proceeding also raises that issue. The proceeding was instituted on particular charges and the judgment was issued on charges not originally made. It, therefore, deprived the Petitioner of procedural due process. In re Ruffalo, 390 U.S. 544, 88 S. Ct. 1222, 20 L. Ed. 117 (1968).

If charges had been made procedural due process would have required a hearing. The failure to grant a hearing renders the judgment invalid. *Willner* v. *Committee on Character and Fitness,* 373 U.S. 96, 83 S. Ct. 1175, 10 L. Ed. 2d 224, 2 ALR 3d 1254 (1963).

## ARGUMENT

### I.

### THE MAJORITY OPINION AND JUDGMENT SERIOUSLY RESTRICTS THE PETITIONER'S RIGHTS OF FREEDOM OF SPEECH, PETITION AND ASSEMBLY UNDER THE FIRST AND FOURTEENTH AMENDMENTS TO THE FEDERAL CONSTITUTION AND IS CONTRARY TO RELEVANT DECISIONS OF THIS COURT.

The 1968 decretal judgment (A. 176; 383 Mich. 201, 174 N.W. 2d 811, 815, 816) necessarily interferes with the operation of the union plan of recommending union counsel to its members. Though the practice under that plan admittedly resulted in the channeling of legal business to the Brotherhood lawyers, this Court, nevertheless, approved the basic plan. *Brotherhood of Railroad Trainmen* v. *Commonwealth of Virginia, ex rel. Virginia State Bar*, 377 U.S. 1, 12 L. Ed. 2d 89, 88 S. Ct. 1113, 11 ALR 3d 1196 (1964). Despite the prior rulings of this Court, the decretal judgment causes the union members in Michigan to be faced with the possibility of a contempt citation if they misinterpret the meaning or effect of the vague injunctive provisions. Such threat chills the exercise of the constitutional rights already confirmed by this Court and on a record where there is no evidence of any substantive evils justifying any of the injunctive provisions. It is exactly these types of provisions that this Court addressed itself to when it stated in 1964 that:

> "A State could not, by invoking the power to regulate the professional conduct of attorneys, infringe in any way the right of individuals and the public to be fairly represented in lawsuits authorized by

> Congress to effectuate a basic public interest." *Brotherhood of Railroad Trainmen* v. *Virginia*, 377 U.S. 1, 7.

The primary reason asserted by the majority below for its affirmance of the decretal judgment is that: :

> "In short, this Court is not ready——absent a specific order forwarded from Washington——to grant the Brotherhood more relief in Michigan than it has obtained thus far in Virginia."[1]

(A. 214; 383 Mich. 201, 174 N.W. 2d 811, 815). It is submitted that this test is the reverse of the test required by the decisions of this Court. Contrary to the Opinion below, the burden is on the State Bar to prove that the injunction is necessary; it is not on the union to prove that it is entitled to "more relief" here than in Virginia.

When the test utilized by the court below is considered, it is understandable why the Majority Opinion devotes so much attention to the effect of this Court's denial of the Petition For Certiorari from the 1966 Judgment of the Virginia Supreme Court of Appeals. (Some of this attention may be caused by the erroneous belief that the Brotherhood, rather than the Virginia State Bar, sought certiorari). If the denial of that certiorari had the effect of approving the decree, the Michigan Supreme Court could have eliminated the latter half of its Opinion. Since it correctly found that the denial of certiorari had failed

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1. This state of mind in turn is founded upon a holding that the "pleadings, factual record and judgment" are "substantially duplicative" in the two states and a resultant belief that all that need be decided is whether the Virginia decree "comports constitutionally" with this Court's 1964 Opinion (A. 209; 383 Mich. 201, 174 N.W. 2d, 811, 813).

to dispose of the case, the Michigan Supreme Court was required to articulate reasons for the affirmance. That articulation, however, denied the union the benefit of the applicable standard: the State must advance a substantial regulatory interest, in the form of substantive evils flowing from the Petitioner's activities, which would justify the broad prohibitions imposed. *Brotherhood of Railroad Trainmen* v. *Commonwealth of Virginia, ex rel. Virginia State Bar*, 377 U.S. 1, 8, 12 L. Ed. 2d 89, 88 S. Ct. 1113, 11 ALR 3d 1196 (1964).

Even if there had been some proof of substantive evils, the injunctive provisions must fall. It is well-established that the provisions of a decree must relate specifically and exclusively to the proof. If not so related, those provisions are rendered void for vagueness and overbreadth. This is a requirement as stated in *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 438, 9 L. Ed. 2d 405, 421, 83 S. Ct., 328, 340 (1963) because:

> "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms."

With these considerations in mind, it is clear that the decretal judgment obviously offends the union's constitutional rights of freedom of speech, petition and assembly. That infringement alone requires the reversal without remandment of the judgment. It is respectfully submitted that this Court's Opinion in *Brotherhood of Railroad Trainmen* v. *Commonwealth of Virginia, ex rel. Virginia State Bar*, 377 U.S. 1, 12 L. Ed. 2d 89, 88 S. Ct. 1113, 11 ALR 3d 1196 (1964), compels that result.

The contrary result reached below was caused by a failure to examine the pleadings, a failure to consider the evidence and a failure to evaluate the specific injunc-

tive provisions in the light of this Court's mandate. These failures permit the majority to recognize, without effect, that this Court not only reversed certain sections of the Virginia injunction of 1962, but further to recognize that this Court remanded with instructions that the basic plan must not be affected and that the activities involved must not be forbidden by the other sections of the 1962 Decree. It also permits the majority to recognize that the lawyers involved must be accorded a "like protection." Despite these recognitions of the language of this Court's Opinion, the Majority Opinion, surprisingly, never discusses any of the injunctive provisions but, instead, defers to the 1966 Opinion by the Virginia Supreme Court of Appeals. It was pointed out to the court below the dubious value in that case as precedent. This is especially so because, after remandment and entry of the modified decree by the trial court, the Brotherhood's Petition for Leave to Appeal was denied upon technical grounds.[2]

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2. The Order entered on March 6, 1968 reads as follows:

"The petition of Brotherhood of Railroad Trainmen for an appeal from a decree entered by the Chancery Court of the City of Richmond on the 20th day of June, 1967, in a certain chancery cause then therein depending, wherein the Commonwealth of Virginia, ex rel. Virginia State Bar was plaintiff and said petitioner was defendant, having been maturely considered and a transcript of the record of the decree aforesaid seen and inspected, the court being of opinion that the appeal was not perfected in the manner required by law, in that the petitioner in effect seeks an appeal from the final order entered by this court on June 13, 1966 (207 Va. 182, cert. denied, 385 U.S. 1027), doth reject said petition and refuse said appeal."

Moreover, this was not the first technical distinction made by the Virginia courts in order to adhere to the provisions of the injunctive Decree which were affirmed. That court continued in effect all of the findings of fact made by the Chancery Court of the City of Richmond in 1962. See footnote No. 1, *Brotherhood of Railroad Trainmen* v. *Commonwealth of Virginia ex rel. Virginia State Bar*, 207 Va. 182, 149 S.E. 2d 265, 266 (1966). Among the findings are several directly contradicting this Court's statements or rendered irrelevant by reason of this Court's Decision. One of those findings is that counsel are held out as the only approved counsel, a provision which this Court struck from the enjoining portion of the Decree. The retention of these findings was accomplished quite simply on remand by the Chancellor. He held that he was required to enter an injunction by reason of the mandate. He then proceeded to add provisions to the 1962 Decree restraining "solicitation" while permitting "encouraging" or "recommending." As specifically noted by the Virginia Supreme Court of Appeals. *Brotherhood of Railroad Trainmen* v. *Commonwealth of Virginia ex rel. Virginia State Bar*, 207 Va. 182, 149 S.E. 2d 265, 269 (1966). This distinction was the only one too gross for that court which struck it down, but the Court of Appeals then permitted the findings of fact and the remainder of the injunctive provisions to stand by drawing another, and alternative, distinction. It decided that no doubt was cast on their correctness by this Court's Opinion and that it had held that they were "plainly right" on the denial of leave to appeal prior to this Court's decision. See 149 S.E. 2d 272. This incorporation of the 1962 findings of fact and of the remaining injunctive provisions in the 1968 Decree, as modified, is particularly astounding when

it is noted that no evidence as to any activities in Virginia by the Brotherhood was presented at the 1962 hearing in Virginia. Consequently, the Chancellor there found it necessary to base the injunction on an inference. In support of that inference, the Chancellor made the following finding (see footnote 1, at 149 S.E. 2d 266):

> "And the court finds that there is reasonable ground for apprehension that this plan and course of conduct will, in furtherance of the defendant Brotherhood's avowed purpose, be adopted and put into effect in the City of Richmond, within the jurisdiction of this court."

The judgment below, of course, incorporates such fine distinctions when it defers to Virginia. Virginia's courts, however, were outdone in the drawing of fine distinctions by the courts of Michigan. These distinctions were drawn in the face of a clear recognition of the fundamental issue by the trial court. In 1962, the court stated (A. 111):

> "The problem of recommendation of counsel by the Brotherhood is the nub of the proceedings presently before this Court, the right of freedom of speech being basically involved."

Nonetheless, the trial court relied on *In re Brotherhood of Railroad Trainmen*, 13 Ill. 2d 391, 150 N.E. 2d 163 (1958) and on the pleadings disclosing ". . . in substance that the practices complained of were in existence up to May 31, 1959" (A. 109) and issued the 1962 Decree restraining acts neither alleged nor found by the Illinois court. The trial court ignored the holding of the Illinois Supreme Court which was based on public policy grounds and not on constitutional grounds which were neither raised before, nor discussed by, that court permitting the Brotherhood to generally and specifically recommend union counsel to its members. Despite the trial court's

quotation of that section of the Illinois Opinion and despite its holding that freedom of speech was basically involved, it prohibited the making of unsolicited calls upon a member for the purpose of soliciting contracts for the employment of a lawyer or for the purpose of recommending or urging that a lawyer be employed (A. 117). In doing so, it relied on the 1962 Virginia Decree reversed by this Court though ostensibly preferring the Illinois Decree. On its own, it required that sub-paragraph (e) be added which generally enjoined any conduct prohibited by the Illinois decision. It justified that addition on the interesting distinction that the Brotherhood's answer had injected it into the case conveniently ignoring the fact that the Complaint was a paraphrase of the Illinois Opinion and that the State Bar's Exhibits 1 and 2 were a Motion and a Petition, respectively, filed in the Illinois proceeding.

After a full argument and on additional Briefs as to the effect of this Court's Opinion in *Brotherhood of Railroad Trainmen* v. *Commonwealth of Virginia, ex rel. Virginia State Bar*, 377 U.S. 1, 12 L. Ed. 2d 89, 88 S. Ct. 1113 (1964), the Michigan Supreme Court reversed the 1962 Decree remanding with ". . . permission for amendment of plaintiff's bill to seek, if it be so advised, relief not inconsistent with . . ." this Court's Opinion. (A. 172); 374 Mich. 152, 132 N.W. 2d 78). On remand, no amendment was proferred; the State Bar stating, "The plaintiff does not care to amend the Complaint . . ." (A. 180). The defendant protested the lack of an amended complaint when the 1965 Virginia Decree was submitted (A. 181) and when the 1968 motion for judgment was made (A. 193). Nevertheless, the trial court entered its 1968 Decree which contained no findings of fact. Its Opinion

ignored the pleadings question, accepted the Virginia Supreme Court's interpretation of this Court's mandate, and distinguished *United Mine Workers* v. *Illinois Bar Association*, 389 U.S. 217, 88 S. Ct. 353, 19 L. Ed. 2d 426 (1967) (A. 174). The Michigan Supreme Court Opinion affirmed the 1968 Decree and drew a final, untenable distinction against the union's interest. The "permission" to amend was only an alternative; the State Bar retained the right to wait and to choose the final Virginia Order.

The net of these decisions in Virginia . . in Michigan is the instant judgment which credits this Court's Opinion with only two effects: (1) it eliminates the specific injunctive provisions specifically struck down and (2) it prohibits the addition of provisions drawing a distinction between "solicitation" on the one hand and "recommending" or "urging" on the other. All the Findings of Fact and all the remaining 1962 injunctive provisions were retained by Virginia. Thus the final Virginia Decree, and hence the judgment below, is the narrowest rational reading possible of this Court's Opinion.

It is respectfully suggested that this Court's mandate required a great deal more. The sum of the Opinion as well as the specific language required a reevaluation of the remaining portions of the Decree and prohibited the rubber stamping given it. As this Court said, the State is required to advance a ". . . substantial regulatory interest, in the form of substantive evils flowing from petitioner's activities . . . [to] . . . justify the broad prohibitions . . . imposed." That statement was itself a quotation from *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 433, 83 S. Ct. 328, 9 L. Ed. 2d 415 (1963). There, as here, the record was devoid of any evidence of interference in the actual conduct of litigation or of any neglect or harassment of clients. Here,

as there, the judgment should be reversed. See 371 U.S. 433.

The invalidity of the instant injunction is rendered more apparent when its provisions are examined in detail. Each of those provisions can be used to chill the union members from exercising their constitutional rights. The first injunctive provision prohibits ". . . giving or furnishing legal advice to . . . members or their families . . . (A. 176). This provision flies squarely in the face of this Court's holding in *Brotherhood of Railroad Trainmen* v. *Virginia*, 377 U.S. 1, 5, 6:

> "It cannot be seriously doubted that the First Amendment's guarantees of free speech, petition and assembly give railroad workers the right to gather together for the lawful purpose of helping and advising one another in asserting the rights Congress gave them in the Safety Appliance Act and the Federal Employers' Liability Act, statutory rights which would be vain and futile if the workers could not talk together freely as to the best course to follow. The right of members to consult with each other in a fraternal organization necessarily includes the right to select a spokesman from their number who could be expected to give the wisest counsel. That is the role played by the members who carry out the legal aid program. And the right of the workers personally or through a special department of their Brotherhood to advise concerning the need for legal assistance—and, most importantly, what lawyer a member could confidently rely on—is an inseparable part of this constitutionally guaranteed right to assist and advise each other."

Respondent states that this provision only prohibits "furnishing legal advice" which means "practicing law" (Op. p. 6) and later that this Court ". . . did not authorize the union or any of its members to themselves practice

law by giving or furnishing legal advice" (Opp. 12). This reading ignores the lack of evidence of any "practice of law" as well as the meaning which the ordinary union member would derive from the provision. Attributing such a meaning here assumes a contradictory position to that taken below. There, the contention was that great numbers of cases went to the union lawyers; now it is claimed that a number of these cases were resolved on the basis of a layman's legal opinion.

This is stated despite the fact that the claims involved, unlike workmen's compensation claims, are not self-executing. There is no schedule of amounts which can be the basis of a settlement. Furthermore, when a dispute as to the settlement amount cannot be resolved, it is necessary that an action be filed in some court, an action requiring the services of a lawyer. If all this is put aside and if it is conjectured that members do make statements about the merits of a case, such statements are clearly statements of opinion and are not the giving of legal advice or the practice of law. If it is to be speculated that such statements are, in fact, the practice of law; it is apparent that such statements are almost pure speech and are constitutionally protected. It is, however, suggested that there is no basis for the State Bar's reading of the Decree for it cannot be contradicted that the union's legal aid plan intends that the members cases be channeled to the union lawyer.

The second injunctive provision prohibits "informing any lawyer or lawyers that an accident has been suffered by a member or non-member of the said Brotherhood and furnishing the name and address of such injured or deceased person for the purpose of obtaining legal employment for any lawyer." This provision was placed in the

Virginia Decree with a legal gloss applied by the Virginia Supreme Court of Appeals so that it is to be understood as applying only to assisting lawyers "running and capping for themselves." *Brotherhood of Railroad Trainmen* v. *Commonwealth of Va. ex rel. Virginia State Bar*, 207 Va. 182, 149 S.E. 2d 265, 271, 272. It is suggested that the gloss was unwarranted and that it subverts the mandate of this Court, endangers the members with a contempt charge on a basis which has nothing whatsoever to do with the operation of the union's program and constitutes a thinly veiled attempt, by that court, to terrorize the Virginia lawyers so that no one of them will participate in the Brotherhood's Plan. As applied in Michigan, it possesses an additional vice, the distinction made in Virginia is not apparent and, indeed, is not ascertainable by the union members in Michigan. Respondent adds a new reading to this provision. Rejecting the Virginia Court's interpretation, it states that the provision prohibits "mass solicitation of claims" subsequent to the rejection of legal counsel in the first instance (Opp. 12). This reading conjures up a situation neither charged in the Complaint nor existing in reality. It is similar to the Virginia reading; but only in that respect.

The majority of the Michigan Supreme Court specifically state that they wish the same conditions to apply in Michigan as were applied in Virginia. Therefore, the Virginia interpretation cannot be disregarded despite the State Bar's assertion. Moreover a ruling by this Court on this point is particularly required. Canon 2, of the new Code of Professional Responsibility adopted by the American Bar Association provides:

> "A lawyer should assist the legal profession in fulfilling its duty to make legal counsel available."

The Illinois Supreme Court has also adopted this Code. This is relevant here because the attorneys named in the Complaint, but not served, practice in Illinois. Ethical Consideration 2, under that Canon, states that the legal profession should assist laymen to recognize legal problems because such problems may not be self-revealing and often are not timely noticed.

After a floor fight in the House of Delegates, the American Bar Association adopted amended Disciplinary Rule 2-103 D (5) with the result that lawyers may cooperate with legal service programs "but only in those instances and to the extent that controlling constitutional interpretation at the time of the rendition of the services requires the allowance of such legal service activities." Since the Rule permits legal service activities only to the extent that they are constitutionally required, it is essential that this Court speak out in language that cannot be misinterpreted or distinguished.

The third provision prohibits "stating or suggesting that a recommended lawyer will defray expenses of any kind or make advances for any purpose to such injured persons or their families pending settlement of their claim." Again, this is a provision as to which there are neither charges nor evidence. Presumably this provision is based upon either Virginia or Michigan law. The State Bar analyzes the provision as barring the offering of "unethical inducements." The trouble with this analysis is that the language does not so provide. Generally, such advances have been held illegal only when they are used as an inducement to a retainer for an attorney. The making of such payments after retainer is permitted in the State of Illinois, *Mock* v. *Higgins*, 3 Ill. App. 2d 281, 121 N.E. 2d 865, 872 (1954). The advancement of expenses, subject to reimbursement, is uniformly permitted; no

State has held such payment illegal. Moreover, it is difficult to comprehend how such a provision can be deemed part of this union's national plan when lawyer's practices, in this regard, vary from State to State.

The fourth provision prohibits "controlling, directly or indirectly, the fees charged or to be charged by any lawyer." This provision relates to the practice of limiting the union lawyers fee to a maximum of 25% which was in existence before the Illinois decision. That limitation has been removed and legal counsel, in fact, charge various percentages in their contingent fee contracts. The injunction, of course, speaks as of 1968 and should be based on evidence in this proceeding and not upon a condition as a result of the 1958 Illinois Opinion.

The remaining 3 provisions in the Decree relate to a supposed profit obtained by the union through the operations of its legal services plan. Interestingly enough, the fifth provision prohibits the receiving of compensation directly or indirectly for the "solicitation" of legal employment. As it reads, that provision is superflous; it does not relate to the legal services plan of the Brotherhood since this Court has already held that those practices do not constitute "solicitation." The State Bar (Opp. 13) states that the effect of this provision is two-fold. It prohibits unethical conduct by the attorney even though no attorney is a part of the proceeding. Secondly, it prohibits compensation for a recommendation by union members. It is not explained why the union members should be compensated for recommending the union lawyers when it is their duty, under the Constitution of the union, to make such recommendation. The State Bar analyzes the fifth and sixth provisions in the Decree as having the same two-fold effect. (It should also be noted

that the union never obtained a profit from practices antedating the Illinois' Opinion. Payments made to the union were solely for reimbursement of expenses.)

The injunctive provisions for reasons delineated above, are unwarranted. They are not based upon the Complaint, with the exception of the fee charged and the payment of litigation expenses. Not one is based upon the evidence in this case. Those provisions, while contained in the modified Virginia Decree were not there based upon charges or evidence. In these circumstances, it is clear that the holding of this Court prohibits such a Decree for the reason that the State Bar, in each instance, has failed to prove any "substantive evils" as required. The dissenting 3 judges below correctly state that the decretal judgment was inconsistent with this Court's Opinion in 1964 Brotherhood.

Since the 1966 Virginia decision, this Court has handed down its decision in *United Mine Workers* v. *Illinois Bar Association*, 389 U.S. 217, 19 L. Ed. 2d 426, 88 S. Ct. 353 (1967). The majority below, however, refused to give serious consideration to that Opinion stating that it involved a different provision and that the remandment by the Supreme Court of Michigan in 1965 required consistency with this Court's 1964 Brotherhood case only (A. 214). In so holding, the Michigan Supreme Court committed basic, fundamental error. It is absurd for that Court to state that it was freezing the union's constitutional rights as of 1964. When the Mine Worker's decision is considered, it is clear that it basically prohibits the provisions in the Decree barring the financial connection. The majority below rely upon the specific language used by the Illinois Supreme Court in its attempted distinction between the Mine Workers and the Brotherhood case.

That distinction was rejected by this Court and the specific language of the Decree was also reversed. The "operative portion" of the Illinois Decree was not as stated by the Michigan Supreme Court but, in fact, permanently enjoined the union from "employing attorneys on salary or retainer basis to represent its members with regard to workmen's compensation claims . . ." The attempted distinction, therefore, has no basis in fact and contradicted this Court's statement at 389 U.S. 224:

"Nor can the case at bar be distinguished from the Trainmen Case in any persuasive way."

When the Decree affirmed is examined, (See footnote 1, 389 U.S. 218, 219) it is seen that those provisions are strikingly similar to the present Michigan provisions. The first provision in Mine Workers is "giving legal counsel and advice" and is practically the same as the first provision here which is "giving or furnishing legal advice." The second and fifth provisions are also related to the first provision here. The second provision prohibits rendering legal opinions and the fifth prohibits practicing law.

The placing of the Mine Worker's attorney on a salary, of course, is a financial connection and a controlling of the fee in a most direct manner. It is directly relevant to the fourth provision of the instant Decree prohibiting the controlling of fees. Respondent now contends that the Mine Worker's case is not the controlling of fees but, "instead'" is the elimination of fees (Opp. 13). The third, or immediately prior provision prohibits statements about the defrayment of expenses or the making of advances. As to this third provision, the State Bar complains that such practices would be "unfair competition." The total elimination of a fee, of course, renders fee competition impossible. It is the ultimate in control of the fee. Stated another

way; no lawyer can compete for non-fee business when his competition is being subsidized by a salary from the union. Applied to this case, it cannot be constitutionally permissible to prohibit one union from controlling the fee charged its members on an individual case basis when another union is permitted to hire an attorney on a salary basis which it sets for all cases within a given area over a year's time.

For the reasons adverted to above, we suggest that this Decree cannot be sustained under *Brotherhood of Railroad Trainmen* v. *Commonwealth of Virginia, ex rel. Virginia State Bar*, 377 U.S. 1, 12 L. Ed. 2d 89, 88 S. Ct. 1113 (1964). When that case is examined in the light of *United Mine Workers* v. *Illinois Bar Association*, 389 U.S. 217, 88 S. Ct. 353, 199 L. Ed. 2d 426 (1967), any doubts as to the impropriety of the instant judgment are removed. This is especially so considering the lack of evidence at the only hearing in the case; that in 1960. The dissent below correctly summarizes the basic reasons why the judgment below should be reversed without remandment when it states (A. 219, 220; 383 Mich. 201, 174 N.W. 2d 811, 817):

> "Even if the decree could be sustained under the decision in *Railroad Trainmen*, it seems clearly evident that the decree is in plain violation of the holding of the United States Supreme Court in *United Mine Workers*.
>
> I would vacate the judgment for the further reason that this is a chancery case in which the State Bar of Michigan seeks injunctive relief. The State Bar failed to amend or update its complaint upon remand by this Court and it failed to produce any proofs, other than the testimony of Mr. Walsh relating to the period from July 1, 1953 through the year 1960. Neither the trial court nor this Court should afford injunctive relief upon proofs as stale as these, the

very most recent of which relate to a period 10 years ago. Furthermore, the evidence is wholly inadequate to sustain the injunctive relief which was granted."

## II.

## THE OPINION AND JUDGMENT BELOW BEING BASED UPON ACTS NOT PLEADED OR PROVED, AND WITHOUT A HEARING, DEPRIVES THE PETITIONER OF ITS CONSTITUTIONAL RIGHT TO PROCEDURAL DUE PROCESS.

This case began in 1959 with the Bill of Complaint which paraphrased some factual statements made by the Illinois Supreme Court. *In re Brotherhood of Railroad Trainmen*, 13 Ill. 2d 391, 150 N.E. 2d 263 (1958). The portion selected by the State Bar set out the union's plan of contacting its injured members. This method was admitted by the union as follows (A. 13):

> "Defendants aver that in many cases, but not in all, a member of the defendant Trainmen calls upon, contacts, or in some other manner explains to an injured member employee or his bereaved family, the advisability of obtaining a lawyer, or the opinion of a lawyer, and recommends that they consult with the Legal Counsel designated, and further recommends that the Legal Counsel be retained if a lawyer is to be retained. Defendants further aver that some of the said members have represented, as was the fact in most cases arising in the Lower Peninsula of the State of Michigan, that the legal counsel will not charge in excess of twenty-five per cent (25%) of the amount of any recovery whether the recovery be effected by suit or settlement, and that this percentage would include expenses incidental to the investigation and any litigation of the claim."

The only additional factual allegation by plaintiff was made on information and belief that representatives of the Brotherhood were reimbursed for their time lost and out of pocket expenses in bringing injured members to the offices of the Brotherhood's attorneys. (A. 8, 57, 58; Plaintiff's Exhibit 1, A. 55, 126-127). In answer thereto, the Brotherhood stated that such reimbursement had continued up to March 31, 1959, but then had been wholly discontinued by order of the president of the union effective April 1, 1959, which time was within the period permitted for compliance by the said Illinois Opinion (A. 14, par. 5).

It was then alleged that this conduct violated Section 28.642 of the Michigan Statutes Annotated prohibiting the solicitation of legal business. That statute was construed by the Michigan Supreme Court in *Hightower* v. *Detroit Edison Company*, 282 Mich. 1, 247 N.W. 97, 99 (1933) as follows:

> "The purpose of the act is to discourage the practice commonly known as 'ambulance chasing.' The practice has developed recognized evils, the major of which are (1) fomenting litigation with resultant burdens on the courts and public purpose; (2) subornation of perjury; (3) muleting of innocent persons by judgments, upon manufactured causes of action and perjured testimony, and by settlements to buy peace; and (4) defrauding of injured persons having proper causes of action, but ignorant of legal rights and court procedure, by means of contracts which retain exorbitant percentages of recovery and illegal charges for court costs and expenses and by settlements made for quick return of fees and against the just rights of the injured persons."[3]

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3. It should be noted that the Act prohibits the charging of exorbitant fees while the union here is accused of undercutting fees.

In its statement of claim required by Michigan law prior to trial, the State Bar's only contention was that the plan of the Brotherhood was an "organized solicitation of claims." In its long opening statement and throughout the trial, only that contention was made (A. 36-60).

The 1962 Decree made findings of fact as to the method of contacting injured members, ignored the other factual allegations and found that the method of contacting members violated the Michigan statute. (A. 113 through 116). After those findings, the 1962 Decree enjoined the union in six separate respects (A. 117-118). The State Bar claims that those provisions encompass all of the specific acts restrained in the 1968 decretal judgment. (Opp. 15). It is clear that those provisions are not even supported by the 1962 Decree findings of fact unless one accepts the Chancellor's belief that he was entitled to enjoin the Brotherhood on the basis of statements made in other cases.

When the 1968 decretal judgment is read side by side with the 1962 Decree, it is seen that the 1962 decree, while unwarranted, is clearly the more specific of the two. Respondent's argument to the contrary should be rejected and its contention that the Petitioner had its hearing in June of 1961 on the provisions of the 1968 decretal judgment likewise should fall. It is also clear that the argument made, even if warranted, would prove entirely too much. Respondent's contentions suggest too much. On the same premise, it also could be contended that the 1962 Decree should have been re-entered and that the Michigan Supreme Court reversal in 1965 was therefore erroneous.

The lack of merit in the respondent's contention is also disclosed when the 1968 Decree is closely examined. This may be the first decree entered under English Law where

there are no findings of fact. It is understandable why the findings of fact of the Virginia Decree were not copied since those findings contain items specifically stricken down by this Court. (See findings contained in *Brotherhood of Railroad Trainmen* v. *Commonwealth of Virginia, ex rel. Virginia State Bar,* 207 Va. 182, 149 S.E. 2d 265 (1966) at 266). There was, of course, no evidence whatsoever relating to any of the Virginia findings of fact in the Michigan trial.

It would not aid the decree to consider the Michigan statute as embodied in it. That statute, it is quite clear, no longer retains any validity or any applicablity to the Petitioner's plan both because of this Court's decision in *Brotherhood of Railroad Trainmen* v. *Commonwealth of Virginia, ex rel. Virginia State Bar,* 377 U.S. 1, 12 L. Ed. 2d 89, 88 S. Ct. 1113, 11 ALR 3d 1196 (1964) and because of this Court's prior decision in *N.A.A.C.P.* v. *Button,* 371 U.S. 415, 83 S. Ct. 328, 9 L. Ed. 2d 405 (1963). In *Button,* a similar statute was stricken down because of its overbreadth as to the furnishing of legal services by the association there involved, this Court stating at 371 U.S. 433:

> "The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application. Cf. Marcus v. Search Warrant of Property, etc., 367 U.S. 717, 733, 6 L. Ed. 2d 1127, 1137, 81 S. Ct. 1708. These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions. Cf. Smith v. California,

supra (361 U.S. at 151-154); Speiser v. Randall, 357 U.S. 513, 526, 2 L. Ed. 2d 1460, 1472, 78 S. Ct. 1332. Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity. Cantwell v. Connecticut, 310 U.S. 296, 311, 84 L. Ed. 1213, 1221, 60 S. Ct. 900, 128 ALR 1352.

We read the decree of the Virginia Supreme Court of Appeals in the instant case as proscribing any arrangement by which prospective litigants are advised to seek the assistance of particular attorneys. No narrower reading is plausible. We cannot accept the reading suggested on behalf of the Attorney General of Virginia on the second oral argument that the Supreme Court of Appeals construed Chapter 33 as proscribing control only of the actual litigation by the NAACP after it is instituted. In the first place, upon a record devoid of any evidence of interference by the NAACP in the actual conduct of litigation, or neglect or harassment of clients, the court nevertheless held that petitioner, its members, agents and staff attorneys had practiced criminal solicitation. Thus, simple referral to or recommendation of a lawyer may be solicitation within the meaning of Chapter 33."

Subsequent to the 1962 hearing, there has been a refusal to amend the Bill of Complaint. Such permission was specifically granted in the remanding order of the Michigan Supreme Court. No further evidence has been introduced and the latest proofs deal with events in 1960. Those proofs are cards containing information furnished by railroads to the Claims Research Bureau of the Association of American Railroads. No other evidence was produced despite the fact that the only witness from that bureau testified that it had investigators in the State of Michigan investigating Michigan claimants since 1953 (A. 102).

The irrelevancy of the evidence in this case is particularly pointed out by the Chancellor's rejection of the union's contention that it had complied with the Illinois decision. The Chancellor stated that that defense position was untenable because of "indefiniteness and uncertainty." (A. 110). The intervening years, of course, would have removed any indefiniteness and uncertainty. Those intervening years would also remove any *de facto* basis since the Illinois decision was superseded by this Court's constitutional decisions.

The foregoing establishes that the injunction decree was without foundation. Assuming, without conceding, that the proof established the commission of some unlawful acts, it is clear that other unlawful acts disassociated from those proven should be stricken from an injunction decree. *State of Wyoming* v. *State of Colorado*, 286 U.S. 494 (1932); *NLRB* v. *Express Publishing Company*, 312 U.S. 426 (1941); and *Communication Workers* v. *NLRB*, 362 U.S. 479 (1960). (This, of course, avoids the question as to whether the proof of such "unlawful acts" involved practices substantial enough to warrant the issuance of any injunction.)

As we read the Brief in Opposition by Respondent (pps. 14 to 18) it takes the position that these cases are inapplicable because they do not involve the issue of constitutional due process. In our Petition, they were not cited for that proposition, but were cited because the issue of constitutional procedural due process arises in every instance where the record discloses that no such charges, nor proof, were made prior to or during the 1961 hearing. The issue, in fact, arises every time a court decides that it is entitled to an injunction against the Brotherhood's legal aid plan, not because of any evidence

in the case before it but because of an action taken, or a statement made, by some other court in another proceeding.

The argument against such procedure is most cogently made in *National Labor Rel. Bd.* v. *Express Pub. Co.*, 312 U.S. 426, 433 (1941) where this Court states:

> "But we think it does not follow that, because the act of respondent which the Board has found to be an unfair labor practice defined by § 8(5) is also a technical violation of § 8(1), the Board, in the circumstances of this case, is justified in making a blanket order restraining the employer from committing any act in violation of the statute, however unrelated it may be to those charged and found, or that courts are required for the indefinite future to give effect in contempt proceedings to an order of such breadth.
>
> We cannot find such authority or requirement in the carefully chosen language of § 10(c), which directs the Board to state its findings of fact showing the unfair labor practice charged and to order the person accused to "cease and desist from such unfair labor practice," or in § 10(e) of the Act which authorizes the court on application of the Board to enter a "decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board." It is obvious that the order of the Board, which when judicially confirmed, the courts may be called on to enforce by contempt proceedings, must, like the injunction order of a court, state with reasonable specificity the acts which the respondent is to do or refrain from doing. It would seem equally clear that the authority conferred on the Board to restrain the practice which it has found the employer to have committed is not an authority to restrain generally all other unlawful practices which it has neither found to have been pursued nor

persuasively to be related to the proven unlawful conduct."

This is especially true when the Virginia and Michigan courts proceeded upon a theory which can be fairly stated amounted to a belief that it could enjoin any practice criticized by any court since the institution of the Brotherhood's Legal Aid Plan in 1930. It should be remembered also that any favorable finding in any Opinion by any court was uniformly disregarded by the Virginia and Michigan courts. In addition, Petitioner was faced at various points in the proceeding with conditions and burdens of proof which were unknown to it until they were enunciated. For example, only in the Opinion of the Michigan Supreme Court was the union informed that the State Bar had an election as to how it chose to proceed, either by amendment or by awaiting the decision of the Virginia Supreme Court of Appeals to see if it was favorable. This is stated despite the wording of the prior order of the Michigan Supreme Court granting "permission for amendment of plaintiff's Bill to seek, if it be so advised, relief not inconsistent with the Supreme Court's said Opinion." If any alternative was intended at that time it would, of course, have been easy to so state in the Order. The other statements by the Michigan Supreme Court that it "wished a specific order forwarded from Washington" and that the case was sent back to the "Jackson Circuit for consistency with the 1964 Brotherhood case—that only" are other examples of this shifting burden of proof.

On the basis of the entire record Petitioner contends that the conduct of the Michigan Courts is so offensive to the ordinary standards of justice as to amount to a denial of procedural due process. This Court has held that when a proceeding has been instituted on particular charges, procedural due process is denied when a judg-

ment is based upon charges not originally made. In re Ruffalo, 390 U.S. 544, 88 S. Ct. 1222, 20 L. Ed. 117 (1968).

It is, of course, contrary to elementary standards of justice to change the theory on which the case is tried after the trial.[4] If charges as to the injunctive provisions of the 1968 Decree had been made, procedural due process would have required a hearing so that Petitioner could have the opportunity to rebut the charges. This is especially demanded here since the Petitioner at the 1962 trial rested without presenting any evidence. That trial tactic was, of course, taken for that time only upon its belief that the proofs did not justify any injunction.

This requirement of a hearing is so essential to the requirements of procedural due process that this Court has held that it is required when a denial for admission to the Bar occurs on the fifth application for such admission. In *Willner* v. *Committee on Character and Fitness*, 373 U.S. 96, 83 S. Ct. 1175, 10 L. Ed. 2d 224, 2 ALR 3d 1254 (1963), this Court states with particular pertinence here at 373 U.S. 135:

> "There seems no question but that petitioner was apprised of the matters the Committee was considering.
>
> "But a 'full hearing'—a fair and open hearing—requires more than that. . . . Those who are brought into contest with . . . Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Govern-

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4. A similar incident occurred in 1962 when the State Bar appended the decisions of other courts to its Reply Brief. A motion to strike that portion of the Plaintiff's Reply Brief was made by the Petitioner. The court denied that motion stating that it was free to consider "any authorities it deems applicable" (A. 109).

ment proposes and to be heard upon its proposals before it issues its final command." Morgan v. United States, 304 U.S. 1, 18, 19, 82 L. Ed. 1129, 1132, 1133, 58 S. Ct. 773, 999.

Petitioner had no opportunity to ascertain and contest the bases of the Committee's reports to the Appellate Division, and the Appellate Division gave him no separate hearing. Yet, "[t]he requirements of fairness are not exhausted in the taking or consideration of evidence but extend to the concluding parts of the procedure as well as to the beginning and intermediate steps." Id. 304 U.S. at 20. Cf. Gonzales v. United States, 348 U.S. 407, 414, 99 L. Ed. 467, 472, 75 S. Ct. 409."

When these cases are considered in the light of the record in this case, it is surprising that Respondent can contend that Petitioner was afforded procedural due process. The proceedings since remand in 1965 have been contrary to the essentials of that right. For this reason alone, the judgment should be summarily reversed without remandment.

## CONCLUSION

For the reasons adverted to above and because of the demands of law and of substantial justice the Judgment and Opinion of the Supreme Court of Michigan should be reversed without remandment.

Respectfully submitted,

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